Supreme Court, U.S.
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No. 01-517

IN THE

Supreme Court of the United States

MICHAEL JOHN BAK,

Petitioner,

v.

PEOPLE OF THE TOWNSHIP OF REDFORD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS, STATE OF MICHIGAN

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ALLOWED THE PROSECUTION TO INTRODUCE EVIDENCE OF OTHER CONTACTS BETWEEN THE PETITIONER/ DEFENDANT AND THE VICTIM PRIOR TO 1993 AFTER THE PETITIONER OPENED THE DOOR FOR SUCH EVIDENCE. THE ADMISSION OF SUCH EVIDENCE DID NOT VIOLATE THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION?

II. WHETHER UPON A DE NOVO REVIEW THE STALKING ORDINANCE AS APPLIED IN THIS CASE IS CONSTITUTIONAL?

III. WHETHER THE TRIAL COURT PROPERLY DENIED PETITIONER/DEFENDANT'S MOTION FOR A DIRECTED VERDICT OF ACQUITTAL, WHEN THE PROSECUTION PRESENTED EVIDENCE SUCH THAT A RATIONAL TRIER OF FACT COULD FIND THE PETITIONER/DEFENDANT GUILTY BEYOND A REASONABLE DOUBT?

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COUNTER-STATEMENT OF THE CASE

Petitioner, MICHAEL JOHN BAK, (hereinafter referred to as the Defendant), was a criminal defendant in the 17th District Court located in the Charter Township of Redford, Michigan charged with violating the Township's Stalking Ordinance.[1] The Defendant was convicted of stalking by a jury. After his conviction, the Defendant pursued an appeal of his conviction through all of the State appellate courts for the State of Michigan.

The Defendant was a 38 year old man when he first met 10 year old Kelly Ann McHenry, the stalking victim, at a basketball tournament that was held at St. Robert Bellarmine, (hereinafter referred to as St. Robert's), a Catholic Church and school located in the Township. The Defendant, the victim and the victim's family attended the church. The following facts are based on the trial testimony and procedural history in the courts for the State of Michigan.

Kelly first met the Defendant when she attended church basketball games which the Defendant worked at. The Defendant would talk to Kelly, hold her hand and spin her around.

In September, 1990, Kelly and her next door neighbor, Cameron Kompoltwicz were walking home from St. Robert's School. The Defendant saw the girls and began walking and talking to them. At trial, Kelly testified the girls did not want the Defendant walking with them so they began to walk faster.

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1. The Redford Township Stalking Ordinance, § 58-60 was enacted in June, 1993 and mirrors the State of Michigan's statutory provisions prohibiting stalking set forth in M.C.L. 750.411h. The State statutory provisions have been the subject of the same constitutional attack asserted by the Petitioner herein through the State of Michigan Supreme Court and in the United States Sixth Circuit Court of Appeals. Each case has ultimately found that the State statutory provisions do not violate the United States and/or the Michigan Constitution as will be more full discussed herein.

The Defendant then grabbed Cameron's book bag and told Cameron to slow down. This scared both the girls so that when they arrived home they told their parents about the incident. As a result, Kelly's and Cameron's fathers went to the Defendant's home and told the Defendant to stay away from the girls.[2]

In September, 1993, the Defendant saw Kelly at a St. Robert's festival and approached her trying to give Kelly some stuffed animals the Defendant won at the festival. Kelly told the Defendant she did not want the animals; but, the Defendant persisted, so Kelly took them so the Defendant would leave her alone.

The next time Kelly saw the Defendant occurred in March, 1994. Kelly was confirmed that day at St. Robert's and was attending a reception. The Defendant was there also and approached Kelly. Kelly walked away from the Defendant.

Kelly's birthday is March 18th. In March 1994, Kelly received an unsigned birthday card at her home through the mail. The envelope in which the card came did not have a return address on it. The Defendant admitted to a Redford Township Police Officer, Eric Gilman, who testified at trial, that he sent the card to Kelly.

In June 1994, Kelly received another unsigned card through the mail, again with no return address on the envelope, when Kelly graduated from St. Robert's Parish. Kelly was in the Eighth Grade at the time and was 13 years old. The Defendant admitted to sending this card to Kelly as well. The Defendant was also at the graduation ceremony in June, 1994.

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2. These facts were testified to on re-direct of the victim by the Prosecution and are the subject of the Petitioner's first argument that the admission of this evidence violated the ex post facto clause of the United States Constitution. A more detailed account of the testimony is set forth herein at Argument I under the "Reasons for Denying the Writ" section of this Brief.

Kelly's parents made a stalking complaint to the Redford Township Police Department in June 1994. Officer Gilman investigated the complaint and spoke to the Defendant, at which time the Defendant admitted to having sent the two unsigned cards. Officer Gilman informed the Defendant he was to have no contact with Kelly whatsoever or he would be prosecuted for stalking.

In September 1994, Kelly attended another St. Robert's festival. While she was there the Defendant approached Kelly and asked if he could speak to her for a minute. Kelly told the Defendant "No". Kelly testified that she told the Defendant 3 to 4 times that she did not want to talk to him. The Defendant asked again stating "Kelly, can I talk to you for just one minute? I'm not going to say anything wrong." Kelly said no again and walked away. She left to find a police officer because she was scared. The Defendant testified he approached Kelly at the festival to find out if she had received the two cards he sent her.

Kelly testified the Defendant scared her because he had "followed her" home, knew he was supposed to stay away from her; and the Defendant sent her two unsigned cards.

Kelly's neighbor was at the festival in September 1994. The neighbor testified he saw Kelly right after the Defendant attempted to talk to her. At that time, Kelly was hysterical and came running up to him. Kelly was crying and trembling.

Contrary to the assertion of the Petitioner in his Statement of the Case, Page 6, Kelly did not recant her testimony as to being scared of the Defendant or as to the contacts she had with the Defendant.

Officer Gilman contacted the Defendant on September 27, 1994, and asked the Defendant to come to the police station to discuss the Defendant's contact with Kelly at the festival. The Defendant went to the police station and was interviewed

by Officer Gilman. During the interview, the Defendant admitted to sending the two unsigned cards to Kelly. The Defendant admitted he had been told in 1990 to stay away from Kelly by Kelly's father. The Defendant also admitted to attempting to speak with Kelly at the festival in September 1994. During the interview, the Defendant wrote out his own statement as to what occurred between him and Kelly during the September 1994 festival. Eventually a charge of stalking was filed against the Defendant and prosecuted in the 17th District Court.

Prior to the jury trial, Defendant filed a Motion to Dismiss asserting the Township stalking ordinance was unconstitutionally void for vagueness and overbroad. The motion was denied by the trial court. The Defendant then filed a Motion in Limine to have the trial court prohibit the prosecution from introducing any evidence of the Defendant's contacts with Kelly prior to the enactment of the Township Ordinance on June 23, 1993. The prior contacts occurred on June 7, 1989, September 25, 1990 and September 28, 1990. The Defendant argued these incidents occurred prior to the enactment of the stalking ordinance and any reference to these incidents at trial would violate the ex post facto law; **citing the Michigan Constitution;** Mich. Const. 1963, Art 1, § 10; and *People v. Potts*, 181 Mich. App. 311; 448 N.W.2d 820 (1989); **not the United States Constitution.** The Defendant also asserted any introduction of the prior incidents would be more prejudicial than probative.

The trial court granted the Defendant's motion in part prohibiting the prosecution from introducing any testimony relating to contacts with other children and the contacts the Defendant had with Kelly prior to the enactment of the stalking ordinance. The Court allowed the prosecution to introduce testimony which would lay a foundation for the jury so the jury would understand that Kelly and the Defendant knew each other before the alleged crime took place. However, the prosecution

was prevented from getting into any of the details regarding those prior contacts and what took place when the contacts occurred. The trial court allowed the prosecution to introduce testimony to the effect that Kelly's father had previously told the Defendant to stay away from Kelly. The trial court told the prosecution it would have to introduce some testimony that the Defendant had been told to stay away from Kelly by someone *after* the enactment of the stalking ordinance in order for the charge to go forward. Then on cross-examination of the victim's father, the Defendant elicited testimony which went into the details of the time that the Defendant followed the victim and her friend home from school, prior to the enactment of the stalking ordinance.

At trial Kelly testified as stated previously. During the Defendant's cross-examination of Kelly, counsel for the Defendant asked Kelly to tell the Court of *each and every time she was contacted by the Defendant*. Kelly aware of the Court's ruling on Defendant's Motion in Limine, testified only to the contacts the Defendant had with her after the enactment of the stalking ordinance; i.e. September 1993, March 1994, June 1994, receiving the two unsigned cards in March and June of 1994; and, the last attempted contact at the festival in September of 1994. Finally, *just before the Defendant's cross-examination was over the Defendant asked Kelly the following:*

> Q. Other than sending you some nice cards and giving you some teddy bears and saying hello once in a while, that's the only contact you've had with Mr. Bak, right?
>
> A. Yes.
>
> **Mr. Peppler**: No further questions, Your Honor.

After that question, the defense had no more questions for Kelly. The prosecution was offered a chance for re-direct. Prior

to engaging in same, the prosecution and defense had a side-bar conference with the trial court after the jury was excused. At that time a portion of Kelly's testimony was played back. After hearing Kelly's cross-examination testimony the prosecution argued it should be allowed to introduce evidence of all of the prior contacts with Kelly by the Defendant prior to 1993. The prosecution argued the Defendant opened the door when he asked Kelly if there had been any other contacts with the Defendant. The prosecution argued that by asking the last question quoted above defense counsel had left the jury with the impression that the only contacts with Kelly were innocent and Kelly's fright of the Defendant was unfounded. The trial court agreed and allowed the prosecution to question Kelly as to the other contacts she had with the Defendant prior to 1993. Kelly testified to the time she was walking home with her neighbor and the Defendant grabbed the neighbor's book bag. Kelly also testified that the Defendant had followed her home from school on one or two prior occasions. The Defendant was then given the opportunity to re-cross Kelly and chose not to.

Prior to presenting his defense, counsel for the Defendant moved for a directed verdict of not guilty arguing the prosecution failed to establish the necessary elements for the crime of stalking. The trial court denied the motion.

During the Defendant's trial testimony, the Defendant admitted he had been told by the police to stay away from Kelly and other children at St. Robert's. Defendant also admitted he had been told in 1990 to stay away from Kelly by Kelly's father. The Defendant testified the cards were sent unsigned due to a mere oversight on his part. He had just forget to sign them before he sent them.

Prior to submitting the case to the jury for its deliberations the trial court gave instructions to the jury which neither the prosecution nor the defense objected to. For purposes of

addressing the arguments of the Petitioner in his Petition for Writ of Certiorari some of the instructions given by the trial court are quoted below:

> **The evidence must convince you beyond a reasonable doubt that the crime occurred between the dates September, 1993 and September, 1994, within the Charter Township of Redford**. (Emphasis added).
>
> The defendant is charged with the offense of stalking. To establish this charge the prosecutor must prove each of the following elements beyond a reasonable doubt.
>
> First, that the defendant committed two or more willful, separate and noncontinuous acts of unconsented contact with Kelly McHenry.
>
> * * *
>
> Second, that the contact would cause a reasonable individual to suffer emotional distress.
>
> Third, that the contacts cause [sic] Kelly to suffer emotional distress.
>
> Fourth, that the contact would cause a reasonable individual to feel terrorized, frightened, intimidated, threatened, harassed or molested.
>
> Fifth, that the contact caused Kelly McHenry to feel terrorized, frightened, intimidated, threatened, harassed or molested.
>
> As uses in this section, course of conduct means a pattern of conduct composed of a series of two or more separate noncontinuous acts evidencing a continuity of purpose.

Emotional distress means a significant mental suffering or distress that may, but does not necessarily require medical or other professional treatment or counseling.

Harassment means conduct directed toward a victim that included but is not limited to repeated or continuing unconsented contact that would cause a reasonable person to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or contact that served a legitimate purpose.

Stalking means a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed or molested.

Unconsented contact means any contact with another individual that is initiated or continued without the contacted individual's consent, or in disregard of that individual's expressed desire that the contact is avoided or discontinued. Unconsented contact includes, but is not limited to, any of the following: (1) Following or appearing within sight of that individual; (2) Approaching or confronting that individual in a public place or on private property; (3) Appearing at the workplace or residence of that individual; (4) Entering onto or remaining on property owned, leased or occupied by that individual; (5) Contacting the individual by telephone; (6) Sending mail or electronic communications to that individual; (7) Placing an object on or delivering an object to property owned, leased or occupied by that individual.

> Victim means an individual who is the target of a willful course of conduct involving repeated or continuing harassment. Any person who engages in stalking is guilty of a misdemeanor.
>
> * * *

After instructing the jury the trial court specifically asked the prosecution and defense counsel if they had any objections to the jury instructions. No objections were made by either party.

On August 11, 1995, the Defendant was convicted under local Township Ordinance for the misdemeanor offense of stalking after the jury deliberated for 1 hour. The Defendant was sentenced to pay fines and costs and was placed on probation for 24 months and ordered not to have any contact with Kelly.

The Defendant appealed as right to the Wayne County Circuit Court raising three issues: (1) The trial court erred in denying the Motion for Directed Verdict when there was insufficient evidence presented to establish the elements of the charge of stalking; (2) the trial court's admission of acts which occurred prior to the enactment of the stalking ordinance violated the ex post facto clause of the United States and Michigan Constitutions; (3) the Township stalking ordinance is unconstitutionally vague and overbroad.

On March 26, 1996, the Honorable John A. Murphy of the Wayne County Circuit Court for the State of Michigan issued an Opinion and Order Affirming the Petitioner's conviction. Petitioner's App. 17-36 Essentially the Circuit Court found there was specific evidence upon which the jury could have convicted the Petitioner.

The Circuit Court found that the Ordinance was not unconstitutionally vague finding that the Ordinance provided the Petitioner with notice of the type of conduct that was

proscribed. (App. 27-31) The conduct was to be judged by a "reasonable person" standard informing the reader of the Ordinance the nature of the acts that could not be done as well notifying a person of the type of damage to be prevented by prohibiting such conduct. (App. 27) The Court found the Ordinance's definition of stalking involved a willful intentional act satisfying the necessary scienter requirements. (App. 28) The Circuit Court noted that the Ordinance was designed to prohibit not only threatening conduct but also the type of stalking resulting from erotomania, in which the stalker pursues his/her victim not with any intent to frighten the victim but only because he/she is obsessively in love with the victim and wishes to express his/her romantic admiration and seek its reciprocal in the victim. The Circuit Court stated:

> A person who willfully pursues a course of conduct involving repeated contacts with another, even if he himself believes these contacts to be desirable and nonthreatening, is still doing *something* deliberately. Thus, a requirement of scienter still exists and still works to save the ordinance from vagueness. Again as the Supreme Court has put it, a statute that penalizes acts "knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act . . . is a violation of the law." *Screws*, 325 U.S. at 102. Moreover, the conduct must still be such as to cause a reasonable person to suffer emotional distress: thus the scienter and reasonable person requirements intertwine to bind the discretion of law enforcement officers. (App. 30-31)

As for the overbreadth challenge, the Circuit Court found the Ordinance explicitly stated it did not apply to constitutionally protected activities or conduct that serves a legitimate purpose.

Again, the Ordinance only prohibited conduct that would cause a "reasonable person" to feel "terrorized" or "intimidated", confining the scope of the Ordinance to prohibiting conduct which is *not* constitutionally protected. (App. 31-32)

The Circuit Court also rejected the argument that the conviction of the Petitioner violated the ex post facto clause of the Constitutions. The Petitioner asserted the trial court improperly allowed the introduction of testimony as to contacts he had with the victim prior to the enactment of the Ordinance. In rejecting this argument the Circuit Court stated:

> We need not reach the "opening of the door" issue itself here, for we go even farther and hold that evidence of acts constituting the pattern of harassment here would have been admissible at trial even absent defense counsel's opening the door.
>
> Appellant's argument has surface validity. The Ex Post Facto Clause of the Federal Constitution hold that "[n]o . . . ex post facto Law shall be passed." U.S. Const. art. I, sec. 9, sl. 3. The U.S. Supreme Court has interpreted this Clause to mean that a law may not be passed if it makes something a crime that was not a crime when it was done. Appellant argues here that any acts committed before the enactment of the stalking ordinance that the prosecution used here, including the warning by the complainant's father constitute precisely such after-the-fact criminalization.
>
> However, the caselaw fails Appellant here. The law holds that while a defendant may not be convicted for a past offense, he may be convicted for an offense that continues after the enactment of the law in question. *See United States v. Poulos*, 895 F.2d 1113,

> 1120 (6th Cir. 1990). Appellant here is not being punished for his pre-enactment course of conduct of harassing complainant but for continuing this conduct even after the stalking ordinance came into existence. (App. 34-35)

Petitioner filed a Delayed Application for Leave to Appeal with the Michigan Court of Appeals. The Court of Appeals denied the Petitioner leave to appeal. As a result, the Petitioner sought review by the Michigan Supreme Court. Instead of granting leave to appeal to the Petitioner, the Supreme Court entered an Order of remand sending the case back to the Michigan Court of Appeals directing the Court of Appeals to consider the Petitioner's Application for Leave to Appeal.

After full briefing and oral argument on July 21, 2000, the Court of Appeals affirmed the Petitioner's conviction and upheld the constitutionality of the Township's Ordinance. The Petitioner failed to include the Opinion of the Michigan Court of Appeals as an appendix for this Court to review. (Michigan Court of Appeals' Opinion Appendix A hereto pp. 1-7).

The Michigan Court of Appeals rejected the Petitioner's argument that the admission of the contacts the Petitioner had with the victim prior to the enactment of the Ordinance violated the Ex Post Facto Clauses of the federal and state constitutions. The Court of Appeals agreed with the trial court and the position of the prosecution that the defense had opened the door to the evidence through his cross-examination of the victim. The Court of Appeals also noted that the jury was specifically instructed that the Petitioner could only be convicted for the contacts that occurred after the enactment of the Ordinance. All of the Petitioner's other arguments were rejected as well.

Being unsuccessful in the Michigan Court of Appeals the Petitioner filed a Delayed Application for Leave to Appeal with

the Michigan Supreme Court a second time. The Michigan Supreme Court entered an Order denying leave to appeal to the Petitioner on June 1, 2001.

On or about September 24, 2001, the Defendant/Appellant, John Michael Bak, Petitioner herein filed a Petition for Writ of Certiorari with this Honorable Court. Plaintiff/Appellee in the State of Michigan courts, THE PEOPLE OF THE CHARTER TOWNSHIP OF REDFORD, and Respondent herein, files this Response in Opposition asserting review should not be granted in this matter.

REASONS FOR DENYING THE WRIT

I.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ALLOWED THE PROSECUTION TO INTRODUCE EVIDENCE OF OTHER CONTACTS BETWEEN THE DEFENDANT AND THE STALKING VICTIM PRIOR TO THE ENACTMENT OF THE ORDINANCE. THE ADMISSION OF SUCH EVIDENCE WAS NOT A VIOLATION OF THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION.

It is well established that the decision to admit or exclude evidence rests within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion. *Cleary v. Turning Point*, 203 Mich. App. 208; 512 N.W.2d (1994); *People v. McAlister*, 203 Mich. App. 495; 513 N.W.2d 431 (1994). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification for the ruling made. *People v. Snider*, 239 Mich. App. 393, 419; 608 N.W.2d 502 (2000).

In this case prior to trial, the Defendant filed a Motion in Limine seeking to preclude the prosecution from introducing evidence of prior contacts involving the Defendant and the victim on June 7, 1989, September 25, 1990 and September 28, 1990. The Defendant argued these incidents should be precluded from being admitted into evidences because the Township stalking ordinance was not enacted until June 21, 1993. Because these alleged incidents occurred prior to June 21, 1993, said incidents would not be a violation of any criminal law. Defendant argued any reference to these incidents at trial would violate the ex post facto clause, citing Mich. Const. 1963, Art. I, Section 10; *People v. Potts*, 181 Mich. App. 311; 448 N.W.2d 820 (1989). The Defendant also argued that the two incidents, June 7, 1989 and June 9, 1989 did not involve the alleged victim but two other unrelated minor children; therefore, such evidence would be more prejudicial than probative. The Defendant was successful in his Motion as described previously.

During the course of trial, the victim, Kelly McHenry, took the stand and was asked on cross-examination by the Defendant to tell the court *each and every time she was contacted by the Defendant*. After Kelly discussed her contacts with the Defendant that took place *after* the enactment of the Ordinance; i.e. in September 1993, March 1994, June 1994, and receiving the two unsigned cards from the Defendant in 1994; the victim testified the next contact occurred six months later in September 1994 at the St. Robert's festival. Just before the Defendant finished his cross-examination of Kelly, Kelly was asked:

> Q. Other than sending you some nice cards and giving you some teddy bears and saying hello once in a while, that's the only contact you've had with Mr. Bak, right?
>
> A. Yes.
>
> **Mr. Peppler**: No further questions, Your Honor.

When the Defendant asked Kelly the questions he did on cross-examination as to the number of contacts the Defendant had with Kelly that caused her to feel stalked, he opened the door for the admission of the pre-1993 contacts with the Defendant. *People v. Whetstone*, 119 Mich. App. 546; 326 N.W.2d 552 (1982); *People v. Whalen*, 65 Mich. App. 687; 238 N.W.2d 376 (1975); *People v. Robinson*, 11 Mich. App. 162; 160 N.W.2d 744 (1968); *People v. Bahoda*, 448 Mich. 261; 531 N.W.2d 659 (1995).

Further, the allowance of said testimony did *not* violate the ex post facto clauses of the United States and/or Michigan Constitutions. The Defendant was not punished for any activity engaged in prior to 1993. The actions of the Defendant prior to 1993 were allowed into evidence on re-direct examination after the Defendant opened the door through his cross-examination. The Defendant's cross-examination attempted to infer that the Defendant's contact was harmless, and should not have caused a reasonable person to feel any emotional distress. Through his questions, the Defendant attempted to convince the jury his contacts with the victim involved a limited number of harmless, non-threatening attempts to be friendly and should not have caused the victim to feel frightened, scarred or harassed.

In accordance with the trial court's pre-trial ruling, on direct examination of Kelly, the prosecution only elicited testimony as to the contacts Kelly had with the Defendant after 1993. However, on cross-examination, the defense attempted to establish those were the only contacts and said contacts would not cause a reasonable person to feel threatened or harassed. Allowing the prosecution to explore the pre-1993 contacts in light of the cross-examination of the victim was not an abuse of discretion. An unprejudiced person considering the facts on which the trial court acted could not say there was no justification for the ruling.

In affirming the Defendant's conviction, the Michigan Court of Appeals stated:

> We agree with the district court that defendant opened the door to testimony about the prior contacts. In any event, the jury was specifically instructed that only those contacts that occurred after the ordinance was enacted should be considered for purposes of the offense charged. "[T]he evidence must convince you beyond a reasonable doubt," the trial court instructed, "that the crime occurred between the dates of September, 1993 and September, 1994, within the Charter Township of Redford." A jury is generally presumed to follow the trial court's instructions, until the contrary is clearly shown. *People v. McAlister*, 203 Mich. App 495, 504; 513 NW2d 431 (1994). The contrary has not been shown in this case. *People v. Bak*, unpublished opinion per curiam of the Court of Appeals , decided July 21, 2000, (Docket # 212056). Appendix A hereto.

In addition, there was ample testimony that the Defendant had contact with the victim *after the enactment of the ordinance* in 1993 and 1994. In June, 1994, Officer Gilman told the Defendant to stay away from the victim. Yet, in September, 1994, the Defendant again had contact with the victim. At that time Kelly had to tell the Defendant two times she did not want to talk to him. Thus, there was ample testimony to establish the Defendant engaged in a course of conduct with the victim after the enactment of the ordinance and after he had been told to stay away from Kelly. Yet the Defendant continued and attempted to have contact with Kelly.

In this case, the Defendant argues the admission into evidence of the contacts between himself and the victim prior

to the enactment of the ordinance violated the ex post facto clause of the United States Constitution because it made it easier for the prosecution to convict the Defendant. Thereafter at pages 12-15 of his Petition, the Defendant speculates that the jury did not follow the jury instructions. Jury instructions that specifically stated the Defendant had to be guilty beyond a reasonable doubt of violating the ordinance between September 1993 and September 1994. Defendant argues it is "probable that the jury utilized a contact that occurred prior to June 1993, . . . in order to meet the 'course of conduct' element." This is pure speculation on the part of the Defendant. The Court of Appeals specifically rejected this argument when it stated "that a jury is generally presumed to follow the trial court's instructions, until the contrary is shown; citing *People v. McAlister*, 203 Mich. 495, 504; 513 N.W.2d 432 (1994), finding the Defendant did not show the contrary.

The Defendant fails to remember the undisputed facts. The prosecution presented evidence to establish the Defendant contacted Kelly on six separate occasions *after* the enactment of the Ordinance. Those contacts were: (1) in September 1993, the Defendant approached the victim at the church fair and offered her some stuffed animal toys; (2) between September 1993 and March 1994 the Defendant stared at the victim during several church services; (3) in March 1994, the Defendant tried to speak to the victim at her confirmation reception; (4) in March and June 1994, the Defendant mailed the victim two unsigned cards; (5) in September 1994, the Defendant drove slowly by the victim's house; and (6) in September 1994, the Defendant approached the victim and tried to speak to her at the church fair, despite her repeated refusals on that occasion. From this evidence alone a reasonable jury could have found the Defendant willfully engaged in two or more separate noncontinuous acts, evidencing a continuity of purpose. These facts alone were sufficient to convict the Defendant beyond a reasonable doubt.

Allowing the prosecution to introduce evidence of pre-1993 contacts between the victim and the Defendant did not allow the prosecution to convict the Defendant on less evidence.

If the Defendant had a problem with the prosecution's closing argument and/or jury instructions, he should have objected and/or requested a curative instruction. The Defendant failed to do so. Absent an objection or a request for a curative instruction the Defendant cannot raise those issues now on appeal. *People v. Ullah*, 216 Mich. App 669, 679; 550 N.W.2d 568 (1996).

The state court adjudication in this matter did not result in a decision that is contrary to, or involved an unreasonable application of, clearly established Federal law. The Petition for Writ of Certiorari should be denied.

II.

THE APPLICATION OF THE STALKING ORDINANCE IN THIS CASE IS NOT VOID FOR VAGUENESS OR UNCONSTITUTIONALLY OVERBROAD UNDER THE FIRST AMENDMENT.

The Charter Township of Redford, Code of Ordinances, Chapter 58, Article III, § 58-60 prohibits "stalking" and sets forth certain fines and penalties. Appendix B hereto. Said Ordinance mirrors the State statutory provisions prohibiting stalking set forth in M.C.L. 750.411h. A copy of the Ordinance can be found at Appendix B herein.

Ordinances are presumed to be constitutional. *Detroit v. Qualls*, 434 Mich. 340, 364; 454 N.W.2d 374 (1990). The person challenging the constitutionality of an ordinance has the burden of rebutting that presumption. *Woodward Ave. Corp. v. Wolff*, 312 Mich. 352; 210 N.W.2d 217(1945); *People v. Sell*, 310 Mich. 305; 17 N.W.2d 193 (1945). Further, a court is obligated to

construe a statute or ordinance as being constitutional unless its unconstitutionality is clearly apparent. *Thompson v. Merritt,* 192 Mich. App. 412, 424; 481 N.W.2d 735 (1991).

In *People v. White*, 212 Mich. App. 2998; 536 N.W.2d 876 (1995), the Michigan Court of Appeals had to decide whether the State statutory provisions prohibiting stalking was constitutional in the face of vagueness and overbreadth challenges. In *White*, the defendant was charged with violating a local ordinance for the Township of Grand Blanc. In footnote 2 of the opinion the Michigan Court of Appeals acknowledged the local ordinance was identical to M.C.L. 750.411h. *White* at 304.

In his appeal, the defendant in *White* argued, among other things, that the stalking statute was unconstitutionally vague and abridged the defendant's First Amendment right to free speech by permitting a complainant to determine subjectively which telephone calls are acceptable and which are criminal under the stalking statute. Secondly, the defendant argued the stalking law did not provide adequate and fair notice of the prescribed conduct so as to afford him due process. Finally, the defendant asserted the statute was vague because it allowed the trier of fact unstructured and unlimited discretion to determine whether the contacts were criminal or not.

These same arguments are being asserted by the Defendant/ Petitioner herein. (Petition for Writ of Certiorari, p. 19). However, in this case the Petitioner has raised for the first time that this Court should conduct a facial analysis for the additional reason that the statute/Ordinance "contains no substantial *mens rea* requirement. This argument ignores the fact that on appeal after the Wayne County Circuit Court noted the correct legal standard for analyzing a void for vagueness challenge the Court specifically stated the necessary scienter requirement was contained in the Ordinance stating:

> Moreover, the definition of stalking involves not just any crossing of the line but a "willful" or intentional one. This is important here because in assessing the vagueness, or lack thereof, of an ordinance or statute courts will focus on the necessary scienter requirement. As the U.S. Supreme Court has put it, to punish acts "knowingly done with the purpose of doing that which the statute prohibits, the accuses cannot be said to suffer from lack of warning or knowledge that the act . . . is a violation of the law." *Screws v. United States*, 325 U.S. 91, 102 (1945). App. 28.

The Petitioner also asserts "and the more recent decisions of the Supreme Court indicate the facial challenges on due process grounds are appropriate." Yet, there is no case law from this Court cited by the Defendant/Petitioner.

In *Staley v. Jones*, 239 F.3d 769 (6th Cir. 2001), the Sixth Circuit Court of Appeals reversed a finding of the United States District Court for the Western District of Michigan that held the Michigan aggravated stalking statute was unconstitutionally overbroad in violation of the First Amendment. The reversal was based on a finding by the United States Sixth Circuit Court of Appeals that the state court's determination that the Michigan stalking statute was not vague or overbroad was not contrary to, or an unreasonable application of, federal law. Citing this Court's decision in *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 1523; 146 L. Ed. 2d 389 (2000); and stating:

> The Court held that a decision of a state court is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently that this Court has on a set of materially indistinguishable facts."

> *Id.* 120 S. Ct. at 1523. The Court also held that an "unreasonable application" occurs when "the state court identifies the correct legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* A state adjudication is not "unreasonable" simply because [the federal] court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. *Id.* at 1522. n6

After a de novo review of the defendant's constitutional arguments in *White,* the Court recognized the statute/ordinance is afforded a strong presumption of validity, and the Court had a duty to construe it as such, absent a clear showing of unconstitutionality; citing *People v. Lardie,* 207 Mich. App. 615, 617; 525 N.W.2d 504 (1994); *aff'd,* 452 Mich. 231; 551 N.W.2d 656 (1996); *White,* at 309. Further, the Court recognized that a basic tenet of due process prohibits the enactment of a statute which does not clearly define its prohibitions. *Michigan State AFL-CIO v. Civil Service Comm (After Remand),* 208 Mich. App. 479, 492; 528 N.W.2d 811 (1995), citing *Grayned v. Rockford,* 408 U.S. 104, 108; 92 S. Ct. 2294; 33 L. Ed. 2d 222 (1972).

In *White,* the Court recognized three standards for evaluating constitutional vagueness challenges to statutes which are:

> A statute may be challenged for vagueness on grounds that it
>
> - is overbroad, impinging on First Amendment freedoms, or
> - does not provide fair notice of the conduct prescribed, or

- is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether an offense has been committed. (Citations omitted). *White,* at 309.

Keeping these principles in mind, in *White*, the Court held that neither M.C.L. 750.411h; nor M.C.L. 750.411i; were overbroad or impinged upon the defendant's First Amendment rights under the United States and/or Michigan Constitutions. Reaching that conclusion the Court cited *Kotmar, Ltd v. Liquor Control Comm*, 207 Mich. App. 687, 696; 525 N.W.2d 921 (1994); and *Broadrick v. Oklahoma*, 413 U.S. 601, 613-615; 93 S. Ct. 2908; 37 L. Ed. 2d 830 (1973).

In *Broadrick*, this Court held overbreadth challenges to a statute will *not* succeed when a person to whom a statute may be applied constitutionally has challenged the statute on the ground that it could conceivably be applied in an unconstitutional fashion to other situations. In reaching that conclusion this Court stated:

> [T]he plain import of our cases is, at the very least, *that factual overbreadth adjudication is an exception to our traditional rules of practice* and that *its function is*, a *limited one* at the outset, attenuates as the otherwise unprotected behavior that is forbids the State to sanction moves from "pure speech" toward conduct and that conduct – even if expressive – falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful constitutionally unprotected conduct. . . . To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real but substantial as well, judged in relation to the statute's legitimate sweep. . . . *Broadrick*, at 615.

White, recognized the holding in *Broadrick*. *White* also recognized that the stalking statute/ordinances address a willful pattern of conduct that is combined with speech, that would cause a reasonable person to feel terrorized, threatened, or harassed, causing a reasonable person to suffer emotional distress. The statute/ordinance requires the conduct to be initiated or continued without the victim's consent, or in disregard of the victim's desire to discontinue the conduct. Both the State statute and the Ordinance at issue here specifically state that "harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose. (Appendix B)

White, supra, found the stalking statute provided fair notice of the prescribed conduct because it specifically prohibited defendant's unconsented contact with his victim that was aimed at threatening, intimidating, harassing, or frightening the victim regardless of his alleged reasons for his conduct. *White* has been followed on numerous occasions. *See People v. Coons*, 216 Mich. App. 728; 550 N.W.2d 600 (1996); *People v. Ballantyne*, 212 Mich. App. 629; 538 N.W.2d 106(1995); *People v. Kieronski*, 214 Mich. App. 222; 542 N.W.2d 339 (1996).

The void for vagueness doctrine requires a penal statute to define the criminal offense with sufficient definiteness that an ordinary person could understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357; 103 S. Ct. 1855; 75 L. Ed. 2d 903 (1983). In determining the sufficiency of the notice, the statute must be examined in light of the conduct with which the defendant is charged. *United States v. Nat'l Dairy Products Corp*, 372 U.S. 29, 33; 83 S. Ct. 594; 9 L. Ed. 2d 561 (1963). *West Bloomfield Charter Twp v. Karchon*, 209 Mich. App. 43, 48-49; 530 N.W.2d 99 (1995).

In *Staley, supra*; the Sixth Circuit held the it could not be said that the *White* court's application of *Broadrick* was unreasonable. As the Michigan Court of Appeals recognized, the thrust of the statute is proscribing unprotected conduct. Furthermore, any effect on protected speech is marginal when weighed against the plainly legitimate sweep of the statute, and certainly does not warrant facial invalidation of the statute. In fact the Sixth Circuit Court of Appeals noted that a comparison with cases decided by this Court in which the Court struck down laws on overbreadth grounds makes this clear.

Applying the law to the facts of this case, the District Court stated a reasonable person was provided adequate notice of the prohibited conduct in the Township Ordinance. Further, the Ordinance does not impinge upon the First Amendment freedoms of the Defendant, given the age and intellectual ability of the Defendant, as well as the victim's age and the facts presented in the Briefs submitted by the parties prior to the hearing on the Motion in Limine.

Given the fact that the Defendant admitted to being told to stay away from the victim by the victim's father in 1990; and the alleged acts set forth in the charges against the Defendant, for his conduct in 1993 and 1994, it is clear a reasonable person would know the statute prohibited the conduct of the Defendant.

The Circuit Court also rejected Defendant's constitutional challenges finding a reasonable person had fair notice of the type of conduct prohibited. (App. 30-31)

A person will not succeed in challenging a statute on overbreadth grounds if the statute can be constitutionally applied to that person under the facts presented. This Court has recognized, that with respect to overbreadth challenges, a person to whom a statute may be applied constitutionally may not challenge that statute on the ground that it conceivably may be

unconstitutional when applied to others in situations not presented to the court. *Broadrick, supra.* Since the Petitioner's conduct clearly fell within the conduct proscribed by the Ordinance this Court should deny the Petition.

III.

THE DISTRICT COURT PROPERLY DENIED DEFENDANT'S MOTION FOR DIRECTED VERDICT OF ACQUITTAL WHEN THE PROSECUTION PRESENTED SUFFICIENT EVIDENCE SUCH THAT A RATIONAL TRIER OF FACT COULD FIND THE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT.

On appeal the denial of a motion for directed verdict of acquittal requires the Court to review the evidence in the light most favorable to the prosecution and decide if there is any evidence upon which the trier of fact could predicate a finding of guilt of the crime charged. *People v. Garcia*, 398 Mich. 250; 247 N.W.2d 547 (1976).

On appeal, Defendant contends the District Court erred in denying his Motion for a Directed Verdict of Acquittal claiming the prosecution presented insufficient evidence to establish the elements of the crime of stalking. Respondent reasserts and incorporates herein by reference the Counter-Statement of Facts and the arguments contained at Argument I and II in support of the argument herein.

Reviewing the Township Ordinance it is clear the prosecution presented sufficient evidence upon which a rational trier of fact could find the essential elements of the crime of stalking had been proved beyond a reasonable doubt. *People v. Herbert*, 444 Mich. 466; 511 N.W.2d 654 (1993). Viewing the evidence in the light most favorable to the prosecution the Township met its burden in this case. *People v. Duke*, 189 Mich.

App. 262; 471 N.W.2d 651 (1991); *People v. Hunter*, 201 Mich. App. 671; 506 N.W.2d 611 (1993).

Defendant's reliance on *People v. Kieronski, supra;* and *People v. White, supra*; is without merit. First, both of those cases involved completely different facts from the instant matter and involved aggravated stalking. The Counter-Statement of Facts and Arguments I and II herein establish all of the essential elements were proved beyond a reasonable doubt. The testimonial evidence presented by the prosecution through Kelly McHenry, Kelly's father, Mr. Kompoltowicz, and Officer Gilman establish the elements of stalking.

The prosecution presented evidence that the Defendant engaged in a willful course of conduct involving repeated unconsented to contact with Kelly after having been told on more than one occasion to stay away from Kelly. There is no requirement that Kelly herself tell the Petitioner to stay away from her. Testimony at trial established the Defendant's last attempt to have contact with Kelly left her hysterical, causing Kelly to tremble and cry. This was testified to by Kelly's neighbor, Mr. Kompoltowicz. Therefore, it is clear the prosecution **did make an evidentiary showing of emotional distress,** contrary to the assertions of the Petitioner in his Petition for Writ of Certiorari, page 27.

The Complainant's father told the Petitioner to stay away from Kelly. In addition, Officer Gilman told the Petitioner in June 1994 to stay away from Kelly or he would be prosecuted for stalking. Finally, the fact that Kelly's mother accepted stuffed animals from the Petitioner for Kelly sometime **prior to 1993,** does not mean that the Petitioner could contact Kelly. The animals were left at Kelly's house with Kelly's mother. Kelly was not home at the time. The Petitioner asserts he gave the stuffed animals to Kelly's Mom in 1993 but the trial testimony does not bar this assertion out. In addition, one has to remember

that Officer Gilman testified that he told the Petitioner after that to stay away from Kelly in June 1994.

Based on the undisputed facts presented at trial a rational trier of fact could find the Defendant guilty of stalking beyond a reasonable doubt. Defendants conduct clearly fell within all of the definitions contained in the Ordinance. It cannot be said that the decision of the Michigan Court of Appeals in this case resulted in an adjudication that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by this Court. A state court decision will only be deemed to be an unreasonable application of clearly established Federal law if the state court identifies the correct governing legal principle from this Court, but unreasonably applies that principle to the facts of the Petitioner's case. *Staley v. Jones*, *supra*. In this case the Michigan Court of Appeals correctly identified and applied Federal law governing constitutional challenges of laws on grounds of vagueness and overbreadth.

CONCLUSION

For all the reasons stated and the authority cited herein, Respondent respectfully requests this Honorable Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN DATED JULY 21, 2000

STATE OF MICHIGAN
COURT OF APPEALS

No. 212056
Wayne Circuit Court
LC No. 95-529988-AV

PEOPLE OF REDFORD TOWNSHIP,

Plaintiff-Appellee,

v

MICHAEL JOHN BAK,

Defendant-Appellant.

July 21, 2000

Before: Cavanagh, P.J., and Holbrook, Jr., and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of misdemeanor stalking in violation of the Redford Township anti-stalking ordinance Ch 58, Art III, § 58-60 (hereinafter "the ordinance"). We affirm.

While he was in his late thirties and early forties, defendant contacted the young female victim on several

separate occasions. The contacts began when the girl was ten and continued until she was fourteen. Several years after the contacts began, plaintiff enacted the ordinance. When the contacts continued after the ordinance's enactment, defendant was arrested, tried, and convicted for misdemeanor stalking.

Defendant first argues that the trial court violated the Ex Post Facto Clauses of the federal and state constitutions, US Const, art I, § 9, cl 3; Const 1963, art 1, § 10, when it admitted evidence of contacts that occurred between defendant and the victim before the township stalking ordinance was enacted. We disagree. A law which affects the prosecution or disposition of criminal cases involving crimes committed before the law's effective date violates the constitutional prohibition against ex post facto laws if the law "(1) makes punishable that which was not, (2) makes an act a more serious criminal offense, (3) increases the punishment, or (4) allows the prosecution to convict on less evidence." *Riley v. Parole Bd*, 216 Mich App 242, 244; 548 NW2d 686 (1996).

The ordinance was enacted on June 21, 1993. The following contacts occurred before the ordinance's enactment: (1) defendant's contacts with the victim at basketball games when she was ten years old; (2) defendant's walking or following the victim home from school when she was ten or twelve years old; (3) defendant's requesting permission from the victim's mother to give the victim a stuffed animal; and (4) the victim's father warning that defendant should stay away from his daughter. The remaining contacts, see *infra* at 3, occurred after the ordinance was enacted.

The district court allowed the introduction of testimony regarding those contacts occurring before the ordinance's enactment, ruling that defendant had opened the door to such testimony on cross-examination. The circuit court affirmed, albeit on different grounds.[1] We agree with the district court that defendant opened the door to testimony about the prior contacts. In any event, we note that the jury was specifically instructed that only those contacts that occurred after the ordinance was enacted should be considered for purposes of the offense charged. "[T]he evidence must convince you beyond a reasonable doubt," the trial court instructed, "that the crime occurred between the dates of September, 1993, and September, 1994, within the Charter Township of Redford." A jury is generally presumed to follow the trial court's instructions, until the contrary is clearly shown. *People v. McAlister*, 203 Mich App 495, 504; 513 NW2d 431 (1994). The contrary has not been shown in this case.

Defendant next contends that the township ordinance is unconstitutionally vague and overbroad. We disagree. The ordinance is almost identical to the state stalking statute,

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1. The circuit court relied on *United States v. Poulos*, 895 F2d 1113, 1119-1120 (CA 6, 1990), abrogated on other grounds in *Horton v. California*, 496 US 128; 110 S Ct 2301; 110 L Ed 2d 112 (1990), for the rule that a defendant may be convicted of an offense which begins before the law's enactment, but involves conduct continuing after the law's enactment. The circuit court held, "Appellant here is not being punished for his pre-enactment course of conduct of harassing complainant but for continuing this conduct even after the stalking ordinance came into existence." We do not believe that *Poulos*, which involved the possession of two gun silencer kits that were neither registered nor identified by serial numbers, applies, given the circumstances of the case at hand.

MCL 750.411h; MSA 28.643(8), which we upheld against the same challenges in *People v. White*, 212 Mich App 298; 536 NW2d 876 (1995). For the same reasons set forth in *White*, we conclude that the ordinance here is neither unconstitutionally overbroad nor vague. *Id.* at 308-313.

Defendant also argues that the prosecution failed to present sufficient evidence at trial to support his conviction. We disagree. "In reviewing a sufficiency of the evidence question, this Court reviews the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the elements of the crime were proved beyond a reasonable doubt." *People v. Warren*, 228 Mich App 336, 343; 578 NW2d 692 (1998). In order to be convicted of the ordinance at issue, the prosecution is required to prove: (1) that the defendant willfully engaged in two or more separate, noncontinuous acts, evidencing a continuity of purpose; (2) that such contacts were initiated without the victim's consent, or in disregard of her expressed desire that such contact be avoided or discontinued; (3) that the unconsented to acts would cause a reasonable person to suffer emotional distress; and (4) that the victim actually suffered emotional distress due to these unconsented to contacts.

The prosecution presented testimony that defendant contacted the victim multiple times, over a long period of time. After the ordinance was enacted, defendant contacted the victim on six separate occasions: (1) in September 1993, defendant approached the victim at a church fair and offered her some stuffed animal toys; (2) between September 1993 and March 1994, defendant stared at the victim during several

church services; (3) in March 1994, defendant tried to speak to the victim at her confirmation reception; (4) in March and June 1994, defendant mailed the victim two unsigned cards; (5) in September 1994, defendant drove slowly by her house; and (6) in September 1994, defendant approached her and tried to speak to her at a church fair, despite her repeated refusals on that occasion to speak to him. We believe on this evidence, a reasonable jury could have found that defendant willfully engaged in two or more separate, noncontinuous acts, evidencing a continuity of purpose.

We also believe sufficient evidence was presented to establish the second element of the offense. The township ordinance defines unconsented contact to include "following or appearing within sight of the individual;" "approaching or confronting that individual in a public place or on private property;" or "sending mail . . . to that individual." The evidence produced at trial showed that defendant engaged in each of these types of prohibited contact. Furthermore, the evidence showed that each time defendant attempted to speak to the victim, she either walked away or told him she did not want to speak with him. As for the two unsigned cards sent in March and June 1994, we believe a jury could have reasonably inferred that defendant concealed his identity because he knew that his contacts were unwelcome. Finally, we note that a police officer testified that in June 1994 he warned defendant to stay away from the victim or he would be criminally charged. On this evidence, a jury could have reasonably found that defendant engaged in unconsented contact.

Turning to the two final elements of the offense, we conclude that sufficient evidence was presented to establish

both that the unconsented to acts would cause a reasonable person to suffer emotional distress, and that the victim actually suffered emotional distress due to these unconsented to contacts. Given defendant's age and the victim's age, defendant's repeated attempts to contact the victim, and the victim's knowledge that defendant was not supposed to do so, the jury could reasonably have concluded that a reasonable person in the victim's position would have experienced emotional distress. The evidence also supports a finding that the victim did experience emotional distress. Not only did the victim herself testify that she came to fear defendant's contacts, but the victim's neighbor testified that she was practically hysterical, shaking and trembling after defendant tried to speak with her in September 1994.

Finally, defendant next contends that his trial counsel was ineffective when he failed to include in his motion for directed verdict the argument that the victim's mother consented to defendant's contacts with the victim. We disagree. "To prove a claim of ineffective assistance of counsel . . . , a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense so as to deny defendant a fair trial." *People v. Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998). Defendant must overcome the presumption that the challenged action constituted sound trial strategy. *People v. Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Because defendant failed to move for either a new trial or a *Ginther*[2] hearing, our review of his claim of ineffective assistance of counsel is limited to

2. *People v. Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

the existing record. *People v. Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

We first take issue with defendant's assertion that the victim's mother had actually consented to the continuing contacts. The record shows that the mother agreed to allow defendant to give her daughter some stuffed animals in 1990. We do not believe the mother's acquiescence to this specific request meant that the mother had granted defendant carte blanche to approach her daughter whenever he wanted. Furthermore, the victim's father testified that it occurred before he warned defendant to stay away from his daughter. Even if defendant's testimony as to the timing of this conversation were believed (defendant claimed the warning came after the conversation with the victim's mother), it should have been clear to defendant from the victim's responses to his contacts that regardless of how he interpreted the contact with the mother, the victim herself had not consented to any contact with defendant. Accordingly, we conclude that because any such motion would have been meritless, defendant has failed to establish that his counsel's assistance was ineffective. See *People v. Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Affirmed.

/s/ Mark J. Cavanaugh
/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Kelly

APPENDIX B — STALKING ORDINANCE OF THE TOWNSHIP OF REDFORD, § 58-60

Sec. 58-60. Stalking.

(a) As used in this section:

Course of conduct means a pattern of conduct composed of a series of two or more separate noncontinuous acts, evidencing a continuity of purpose.

Emotional distress means a significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.

Harassment means conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable person to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose.

Stalking means a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed or molested.

Unconsented contact means any contact with another individual that is initiated or continued without the contacted individual's consent, or in disregard of that individual's expressed desire that the contact is avoided or discontinued.

Appendix B

Unconsented contact includes, but is not limited to, any of the following:

(1) Following or appearing within sight of that individual;

(2) Approaching or confronting that individual in a public place or on private property;

(3) Appearing at the workplace or residence of that individual;

(4) Entering onto or remaining on property owned, leased or occupied by that individual;

(5) Contacting the individual by telephone;

(6) Sending mail or electronic communications to that individual;

(7) Placing an object on or delivering an object to property owned, leased or occupied by that individual.

Victim means an individual who is the target of a willful course of conduct involving repeated or continuing harassment.

(b) Any person who engages in stalking is guilty of a misdemeanor, and upon conviction is subject to punishment as prescribed in section 1-11 of this Code.

(c) In a prosecution for a violation of this section evidence that the defendant continued to engage in a course

of conduct involving repeated, unconsented contact with the victim after having been requested by the victim to discontinue the same or a different form of unconsented contact and to refrain from any further unconsented contact with the victim shall give rise to a rebuttable presumption that the continuation of the course of conduct caused the victim to feel terrorized, frightened, intimidated, threatened, harassed or molested.

(d) A criminal penalty provided for under this section may be imposed in addition to any penalty that may be imposed for any other criminal offense arising from the same conduct or for any contempt of court arising from the same conduct.

(e) Except as otherwise stated, any person found guilty of any of the foregoing offenses shall be deemed guilty of the commission of a misdemeanor and punished as prescribed in section 1-11 of this Code.

(Ord. No. 161I, § 7, 6-21-93)